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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARTHUR R. NELSON,

Petitioner,

v.

STEPHEN NELSON, Special Administrator of the Estate of Marjorie Nelson, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether Arthur Nelson, the Defendant, was denied equal protection and due process of the law, under Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution, when the higher courts below applied Canadian law antagonistic to the protections afforded by Illinois' Interspousal Immunity Act.

2. Whether Arthur Nelson is entitled to the protections of all the laws of Illinois when involved in an Illinois tort and sued in Illinois under Amendment XIV to the U.S. Constitution and Article I, Section 2 of the Illinois Constitution.

3. Whether the Illinois Supreme Court has abandoned the sovereignty of Illinois by holding that it will enforce a law antagonistic to Illinois law so as to favor a foreign litigant, even though Illinois public policy and law are supposed to govern all who are subject to it, pursuant to Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution.

4. Whether the application of Canadian right to sue law harms the interests of Illinois citizens, and is contrary and antagonistic to Illinois public policy, thus barring application of Canadian law on principles of comity, in conformance with Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution.

5. Whether Illinois courts have the right to discard the well-settled doctrine of comity between nations in favor of the Restatement Second, Conflict of Laws, in derogation of Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution.

6. Whether a Canadian citizen has the power to export the law of Canada to Illinois in order to defeat the protection afforded by Illinois law that a wife may not sue her husband, in derogation of Amendment XIV of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution.

LIST OF PARTIES

The parties to the proceedings below were Petitioner-Defendant Arthur R. Nelson and Respondent-Plaintiff, Stephen Nelson, Special Administrator of the Estate of Marjorie Nelson, deceased. Petitioner-Defendant Arthur R. Nelson is a resident and citizen/subject of a foreign state, i.e. Ontario, Canada. Stephen Nelson, Special Administrator, is a resident and citizen/subject of a foreign state, i.e. Ontario, Canada. Decedent Marjorie Nelson was, at the time of her death, a resident and citizen/subject of a foreign state, i.e. Ontario, Canada.

Linda F. Hix, formerly a Defendant, is a resident and citizen of Illinois.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Petitioner, Arthur R. Nelson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in the above proceeding on March 23, 1988 together with the order of said court denying petition for rehearing on May 31, 1988.

OPINIONS BELOW

The March 23, 1988 Opinion of the Supreme Court of Illinois is reported at *Nelson v. Hix*, Illinois Supreme Court, 122 Ill.2d 343, 522 N.E.2d 1214, and is reprinted in the Appendix hereto at A. p. 1).

The May 31, 1988 Order of the Supreme Court of Illinois denying Petition for Rehearing is reported at *Nelson v. Hix*, Illinois Appellate Court, Second District, 146 Ill. App.3d 486, 496 N.E.2d 1052, and is reprinted in the Appendix hereto at A. p. 10.

The Order and Opinion of the Appellate Court of Illinois, Second Judicial District, entered July 7, 1986, reversing the trial court's holding that the Illinois Interspousal Immunity Law prevented Marjorie from suing Arthur, her husband, in tort, is reported at *Nelson v. Hix*, Illinois Appellate Court, Second District, 146 Ill.App.3d 486, 496 N.E.2d 1052, and is reprinted in the Appendix hereto at A. p. 11.

JURISDICTION

Federal jurisdiction over this case arises under Article III, Section 2 of the Constitution in that this is a controversy between a citizen of one of the several states and citizens of a foreign state. While it is true that the estate of Marjorie Nelson of Canada for the time being has dismissed its suit against Linda Hix of Illinois without prejudice, Arthur Nelson has an assertable cause of action for contribution against Linda Hix should this case be returned to the trial court. The Plaintiff cannot destroy the jurisdiction of this Court by holding in abeyance its suit against Mrs. Hix.

Federal jurisdiction also arises under Article III, Section 2 of the Constitution, since Arthur Nelson has been deprived of his protection against suit under Illinois law by application of foreign law in derogation of the equal protection and due process guarantees of Article XIV, Sec-

tion 1 of the U.S. Constitution and Article I, Section 2 of the Illinois Constitution. Jurisdiction of this Court to review the judgment of the Supreme Court of Illinois is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case involves consideration of the provisions of the Illinois Interspousal Immunity Act, Ill.Rev.Stat. (1985) Chap. 40, Par. 1001 (A. p. 21) and the Family Reform Act of the Province of Ontario (A. p. 22).

Article III, Section 2 (A. p. 19) and Amendment XIV, Section 1 (A. p. 19) of the United States Constitution are also involved. Article I, Section 2 (A. p. 20) and Article II, Section 1 (A. p. 20) of the Constitution of Illinois are also involved.

Pursuant to Rule 21.1(f) of the Supreme Court Rules, the text of these provisions are set forth in the Appendix hereto as above noted.

STATEMENT OF THE CASE

The facts of this case are undisputed and are recited in part in the Opinion of the Supreme Court of Illinois (A. p. 1). The facts are repeated and augmented for the convenience and edification of this Court.

This is a personal injury survival action originally brought by Stephen Nelson, Special Administrator, on behalf of

the Estate of his mother, Marjorie Nelson, and against his father Arthur R. Nelson, who was operating the automobile in which Marjorie Nelson was injured, and against Linda F. Hix who was operating the automobile which collided with the one in which the Nelsons were riding.

The Nelsons were residents and citizens of Ontario, Canada, and Mrs. Hix is a resident and citizen of Illinois.

The case did not reach trial; the action against Linda F. Hix was dismissed without prejudice. Plaintiff, voluntarily on his own motion, dismissed the wrongful death action against Arthur Nelson; and the Court dismissed the Survival Act count, holding that the Illinois Interspousal Tort Immunity Statute, Ill.Rev.Stat., Chap. 40, Par. 1001 *et seq.* prevented a wife from suing her husband for tort during coverture.

Plaintiff appealed this ruling to the Appellate Court of Illinois for the Second Judicial District. On July 7, 1986, the Appellate Court reversed, holding that Illinois law did not apply, but rather the law of Ontario, Canada, the Nelsons domicile (which permits interspousal suits for tort), applied. Defendant Nelson's Petition for Rehearing was filed on July 28, 1986, and was denied on September 23, 1986.

From the Judgment of the Appellate Court, Defendant Arthur Nelson appealed as of right and alternatively sought leave to appeal to the Supreme Court of Illinois.

The Supreme Court of Illinois granted leave to appeal. No jury was involved and no issues were raised on the pleadings.

The Supreme Court of Illinois upheld the Appellate Court's reversal of the trial court.

The facts of this case are undisputed. On August 11, 1980, Plaintiff's decedent Marjorie Nelson and her husband, Defendant Arthur Nelson, residents and citizens of Mississauga, Ontario, Canada, were visiting relatives in DuPage County, Illinois. At approximately 1:30 p.m. while Defendant Arthur Nelson was driving an automobile rented from Avis Rent A Car at O'Hare International Airport, with his wife as passenger, east on Route 64, the Nelsons' car struck another car driven by Defendant Linda Hix at Glen Ellyn Road. Marjorie Nelson was injured in the accident, but she died nearly two years later of liver cancer.

On September 9, 1980, Arthur R. Nelson (this Defendant) and his wife, Marjorie Nelson, filed an action against Linda Hix, alleging that on August 11, 1980, Linda Hix executed an improper left turn into the path of the Nelsons' oncoming vehicle while traveling at too great a speed, not keeping a proper lookout, and driving on the wrong side of the road. Said Complaint stated that at that time and place Arthur R. Nelson was in the exercise of ordinary care for his own safety. On November 10, 1980, Linda Hix answered, denying the material allegations of Plaintiff's Complaint. As explained in a letter from Attorney Episcope (who represented both Marjorie and Arthur Nelson) to Harbour Insurance Agencies, dated April 20, 1981, he had filed the above action on behalf of the Nelsons because of the negligent actions of Linda Hix.

On July 30, 1984, the lower court dismissed Plaintiff Arthur Nelson's claim against Mrs. Hix, Arthur Nelson having demanded and received in settlement the full amount permitted under Mrs. Hix's insurance policy. This Court also granted leave to Plaintiff Marjorie Nelson to file an Amended Complaint.

On July 30, 1982, Marjorie Nelson filed an Amended Complaint in two counts. Count I charged Linda Hix with making an improper left turn into the path of the Nelsons' vehicle, failing to keep a proper lookout and driving on the wrong side of the road. Gone was the allegation against Mrs. Hix that she was traveling at an excessive rate of speed. In Count II, Marjorie Nelson charged Arthur Nelson with traveling at an excessive rate of speed, failing to sound a warning with his horn. Gone was the allegation that Arthur Nelson was proceeding in the exercise of ordinary care for his own safety. Linda Hix, on August 5, 1982, answered the Amended Complaint, denying its material allegations.

On October 27, 1983, Stephen Nelson substituted himself for Marjorie Nelson as Special Administrator of her Estate, Mrs. Nelson having died of cancer on March 9, 1983.

On November 28, 1983, Circuit Court Judge Bruce Fawell granted Arthur Nelson's Motion to Dismiss Plaintiff's Amended Complaint, holding that the Illinois interspousal immunity law applied and Marjorie, the wife, could not sue Arthur, the husband in tort.

On December 23, 1983, the Plaintiff Administrator filed a Second Amended Complaint in two counts against both Arthur Nelson and Linda Hix alleging negligence.

On January 9, 1984, Judge Fawell granted Defendant Arthur Nelson's Motion to Strike Count I of the Second Amended Complaint (Survival Act Damages) as to Arthur on the basis that the interspousal immunity issue had been decided on November 28, 1983.

Pursuant to Judge Fawell's December 28, 1983 Order, as amended on January 9, 1984, Stephen Nelson then filed a three count Third Amended Complaint. Count III of said Third Amended Complaint was the only count address-

ing Arthur Nelson, and it was based on the Wrongful Death Act. Arthur Nelson filed an Answer to the Third Amended Complaint in which it denied the material allegations therein.

On October 22, 1984, Paul B. Episcope, Ltd. withdrew as Plaintiff's attorney and Plaintiff retained Patrick J. Kenneally, Ltd. as his attorney. On January 6, 1985, Plaintiff filed a Fourth Amended Complaint.

Plaintiff's Fourth Amended Complaint was in four counts: Count I and II are Survival Actions against Defendant Hix and Defendant Nelson, respectively; Counts III and IV are Wrongful Death Actions against Defendant Hix and Defendant Nelson, respectively. Defendant Nelson moved to dismiss those counts of Plaintiff's Fourth Amended Complaint against him, arguing that the Illinois Interspousal Tort Immunity Statute barred actions in tort between the decedent's Estate and the decedent's husband. At the hearing on Defendant's Motion on May 13, 1985, Plaintiff moved to dismiss the Wrongful Death cause of action against Defendant Nelson (Count IV) pursuant to Section 2-1009 of the Illinois Code of Civil Procedure. Circuit Court Judge Lucas granted Defendant Nelson's Motion and dismissed Plaintiff's Survival Action against Defendant Arthur Nelson on the ground that the Illinois Interspousal Immunity Law prevented such a suit.

On May 24, 1985, Plaintiff voluntarily dismissed the action against Linda Hix without prejudice.

The Plaintiff appealed the trial court's dismissal of Count II against Arthur. On appeal, the Appellate Court found that Marjorie had been married to Arthur at the time of the accident, and that the Nelsons resided in Ontario, Canada. The Appellate Court noted that at the time of the accident an Illinois statute prohibited spouses from

suing one another for a tort to the person committed during coverture (Ill. Rev. Stat. 1979, ch. 40, par. 1001), but that the law of Ontario, Canada, permitted such suits (Family Law Reform Act, Ont. Rev. Stat., ch. 152, sec. 65(3)(a) (1980)). Relying upon *Wartell v. Formusa* (1966), 34 Ill.2d 57, the Appellate Court held that the law of the marital domicile applied in resolving the question of whether one spouse can maintain an action in tort against the other and, based on the law of Ontario that allowed such suits, reversed the judgment of the trial court. (146 Ill.App.3d 486.) The Illinois Supreme Court allowed Arthur's petition for leave to appeal. 107 Ill.2d R. 315(a).

The Illinois Supreme Court affirmed the Appellate Court on March 23, 1988, holding:

> 1. That on the date of the accident the laws of Ontario and Illinois were in conflict, that Illinois did not permit suits between husband and wife for tort, while Ontario law expressly permitted such torts.
>
> 2. That the *logic* of *Wartell v. Formusa*, 34 Ill.2d 57 (1966) should control; that the law of the couple's domicile should govern the question of whether one spouse can sue the other in tort.
>
> 3. That the *Restatement* (Second) Conflict of Laws, Sections 169 and 145 control and dictate the choice of law; that the state of domicile is most concerned with the well-being and protection of the marital relationship and has the main duty to establish and regulate the incidents of the family relationship, and that Illinois has little interest in "regulating the right of married foreign citizens" to sue each other in tort.
>
> 4. That although Illinois possesses an interest in preventing collusive lawsuits, that interest is not furthered by preventing suits between spouses in tort.

5. That Ontario's interest in regulating the incidents of the family relationship outweighs any expectation of Illinois insurers who have issued insurance to foreign visitors renting vehicles in Illinois.

6. That the doctrine of comity does not apply because Ontario's law is not clearly contrary to the "public morals, natural justice, or the general interests" of the citizens of Illinois.

7. That "other states have followed the *Restatement*'s approach in applying the marital domicile in conflict cases involving the question of interspousal immunity."

The Illinois Supreme Court denied rehearing on May 31, 1988 (A. p. 10). The Illinois Supreme Court has stayed its mandate to permit this petition for certiorari to this Court.

REASONS FOR GRANTING THE WRIT

I.

THE ILLINOIS SUPREME COURT HAS ERRED IN THE FOLLOWING PARTICULARS.

1. For the first time ever, the Illinois Supreme Court has abandoned the sovereignty of Illinois by holding that it will enforce a law antagonistic to Illinois law so as to favor a foreign litigant, even though Illinois public policy and law are supposed to govern all who are subject to it. Amendment XIV to the U.S. Constitution guarantees any person due process and equal protection of the law, as does the Illinois Constitution, Article I, Section 2. Amendment XIV expressly states that no State deprive

"any person within its jurisdiction the equal protection of the laws." Recognition of Canadian law deprives Petitioner of the protection of Illinois law.

2. This is not a "conflict of laws" case. There is no conflict, because Canadian law, the law of a foreign nation, is irrelevant to suit brought in Illinois to recover for injuries that happen in Illinois. Both procedural and substantive law are governed by the laws of Illinois. This is purely a *domestic case.*

3. For the first time ever, the laws and public policy of a foreign state, which are directly contrary and antagonistic to Illinois public policy as expressed by its laws, are given force, and Illinois' interests are harmed thereby. See *Peters v. Peters,* 634 P.2d 586 (Hawaii 1981).

4. For the first time ever in the history of Illinois, visitors who have placed themselves under the protection and control of Illinois law as temporary residents are accorded greater rights than citizens of Illinois. This suit does not involve just the Nelsons who are citizens of Canada. It also involves Mrs. Linda Hix, a citizen of Illinois, who has a right to depend on Illinois law to the extent that she shall not have to defend and possibly pay a contribution claim in a suit brought between husband and wife.

5. The Illinois Supreme Court has held that interspousal immunity provides a procedural statutory disability.[1] Illinois courts may not provide a common law exception to such a statutory bar for the benefit of foreign citizens who temporarily reside within Illinois and have voluntarily made themselves subject to Illinois law and public policy.

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[1] *Allstate Insurance Company v. Elkins,* 77 Ill.2d 334, 396 N.E. 2d 528 (1979).

Nor may they adopt a foreign law to achieve such a result. This Court has no authority to elevate the Restatement Second over the statutory law of Illinois. The Illinois Interspousal Immunity Statute does not provide an exception for temporary residents or visitors. Abrogation of Illinois statutory law by providing unauthorized common law exceptions such as the *Restatement*, violates the equal protection and due process clause of the Illinois Constitution and of Amendment XIV of the Federal Constitution, as well as the separation of powers.

6. The Illinois Court has erroneously declared that the doctrine of comity is an older operational theory accepted in the Courts during the last half of the 19th century. The doctrine of comity (ordinarily a cause of action arising in a foreign country and suit filed here) is presently fully operational between nations and prevents an acceptance of foreign law which abrogates the law of the forum and the place of the wrong, where there is damage to the general interests of the citizens of Illinois. *Clubb v. Clubb*, 402 Ill. 390, 84 N.E.2d 366, 399-400 (1949). *However, neither comity nor conflict of laws complications as between sister states apply to this purely domestic Illinois action.* Comity, however, would prevent Canadian law from applying were it otherwise cognizable.

7. The cases cited by the Illinois Supreme Court supporting the law of the marital domicile (A. p. 9) are irrelevant and inapposite because all involve accidents that happened outside the forum. The forum is not called upon to violate its own statutory law as is Illinois in this case. Moreover, these cases do not involve the laws of foreign nations, the recognition of which involve obligation and reciprocity, and therefore the doctrine of comity. There is no foreign nation that would give comity to a law of Illinois that has any negative impact on its citizens, i.e.

to collusive or "friendly" suits between Illinois citizens, traveling or temporarily residing abroad.

8. Neither the facts nor the analysis of *Wartell v. Formusa*, 34 Ill.2d 57 (1966) have any relevance, and nowhere nearly the same issues were presented in that case. Illinois was not called upon to abrogate its statutory law in *Wartell* but rather enforce it.[2] Reliance on Restatement Second was misplaced. In any event, the Illinois Courts do not have the power to engraft on Illinois statutory procedural law (the law of the forum) common-law exceptions based on the theories of the American Law Institute. These theories are largely the views of the editors (e.g. Professors Beale and Reese) and hardly deserve the adulation or prominence accorded them by courts in which they have gained currency.

9. The contents of an insurance policy were never part of the record below, nor were they an issue in this case, so that *Nationwide Mutual Insurance Co. v. Perlman*, 187 N.J. Super. 499 (1983) has no relevance to matters at bar. *Nationwide* is also irrelevant because it involved the interpretation of a New York insurance contract. It should further be noted that *Nationwide* involved a Conflict Law situation, asking a New Jersey Court to construe a contract made in a foreign jurisdiction, i.e. New York.

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[2] *Wartell* was a classic conflict case where the accident happened in Florida and the Court was called upon to apply the law of Illinois to a constitutional challenge. The Law of the Domicile rational in *Wartell* can never apply to a purely domestic situation, as at bar—i.e. where Illinois is applying its laws to conduct occurring within its jurisdiction.

II.

NO STATE, INCLUDING CANADA, HAS THE POWER TO EXPORT ITS LAWS. ILLINOIS HAS NEVER RECOGNIZED A FOREIGN LAW THAT RUNS COUNTER TO ILLINOIS PUBLIC POLICY (AS EXPRESSED BY ITS LAWS) OR TO THE INTERESTS OF ILLINOIS CITIZENS ON MATTERS INVOLVING PURELY DOMESTIC ISSUES (CAUSE OF ACTION ARISING IN ILLINOIS, SUIT FILED IN ILLINOIS).

The easy way to bring into focus misapprehensions and erroneous conclusions of the Illinois Supreme Court is to contrast two New York cases:

In *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 386, 274 N.Y.S.2d 591 (1966), a guest passenger was injured in Ontario. Ontario's guest statute provided absolute immunity. The plaintiff, driver and owner, were all residents of New York. The plaintiff was in Ontario for a week's visit at a summer home belonging to others.[3] The automobile involved was garaged and insured in New York. The court, following the most significant contacts or relationship as outlined in *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), rejected Ontario's guest statute, observing that no interest of Ontario "has any relation whatever to the New York policy of affording recovery to injured residents of this State . . ."

In effect, the New York Court said that a suit between New York citizens in a New York forum for Ontario injuries was permissible, and it didn't have to recognize a foreign law because of its public policy of permitting recovery. *The Macey case involved application of principles of comity.* It involved New York residents traveling or

[3] Note that the cause of action arose in Ontario, Canada, and suit was filed in New York. (Doctrine of Comity should apply.)

visiting in a foreign state. The only nexus with Canada was the place of the injury. The place of the injury was viewed as fortuitous, as it was in a similar situation in *Ingersoll v. Klein*, 46 Ill.2d 42 (1964).

However, in *Kell v. Henderson*, 47 Misc.2d 922, 263 N.Y.S.2d 647 (Sup. Ct. 1965), aff'd reim., 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dept. 1966), the New York Court denied defendants' motion to plead to Ontario guest statute as a defense to *a New York accident*, where both passenger and driver were Ontario citizens, on the theory that New York's policy permitted compensation for persons injured on New York roads.

Kell, however, *does not involve conflict of laws*, but rather principles of comity. True, the laws of Canada and New York are different (and in conflict), but *Kell* does not pose a conflicts question as envisioned by the Restatement Second, since, as New York stated, it had the right to declare who should and who should not be compensated for persons injured on New York roads. The Canada law was viewed as irrelevant because the public policy of the forum state where the accident happened was controlling.

The *Kell* case involved a purely domestic New York situation and was treated as such by the New York Court. This Court's opinion in the case at bar is unique since there is no reported case in all of the other 49 states based on any rationale, which give force and effect to a foreign law (be it a sister state or foreign state) which abrogates the statutory law of a state, in a case which is purely *domestic* in nature (i.e. cause of action arising in Illinois, suit filed in Illinois). See also *Maguire, Administratrix, et al. v. Exeter & Hampton Electric Company*, 325 A.2d 778 (N.H. 1974) (Accident in New Hamp-

shire, suit filed in New Hampshire—court refused to apply the law of the domicile of the decedent, i.e. Maine.)

The Court in *Kell* correctly perceived that where the injury occurs in the forum state there can be no conflict of laws regarding an immunity question, since any such question is purely a *domestic one* of what protections and rights are afforded by the laws of the forum and place of the injury, all litigants having sought the protections and benefits of the state which controls the issue of who may or may not be sued as a result of an accident on its roads. As subjects of Illinois, living temporarily in Illinois and enjoying its laws, the Nelsons cannot be heard to say that they can import the law of their Canadian domicile to defeat the Illinois scheme of tort liability for injury in Illinois.

Illinois courts cannot give away the sovereignty of Illinois to Canada, i.e. give away its right to say who shall be able to sue, without profoundly affecting the total scheme of Illinois tort law. Illinois tort law is either a cohesive, indivisible whole or it is not. Litigants are entitled to the protections of all of Illinois tort law as provided by the U.S. and Illinois Constitutions.

The courts of Illinois are not empowered to alter or make exceptions to the statutes of Illinois, for such violates Article II, Section 1 of the Illinois Constitution, Separation of Powers, nor may Illinois courts recognize a foreign law that is opposed to and negates laws passed by the legislature. The legislature has not provided that foreign citizens may use our highways and roads or otherwise enjoy the benefits of Illinois residence, temporary or permanent, without being subject to *all* of the tort laws it has passed to govern the conduct and rights of everyone. The legislature has not provided that Canadian citi-

zens, or anyone else, temporarily residing or traveling in Illinois, may bring with them the laws of their domicile or that the Nelsons or Canadians might be exceptions to Illinois law so that the wife may sue her husband in tort.

The Illinois Supreme Court, by making an unauthorized exception for the Nelsons also denies equal protection and due process to Illinois citizens who must pay for this exception. It is strange that this Court could believe that it would be fair to allow foreign citizens to recover in tort while Illinois citizens cannot recover, and charge Illinois citizens for the privilege of doing so in the form of higher insurance and rental rates for automobiles, to say nothing of the cost of the demeaning spectacle of family members testifying to secure an award that they will inherit. Any such holdings are in direct and flagrant violation of Article I, Section 2 of the Illinois Constitution and Amendment XIV of the U.S. Constitution, which guarantee Illinois citizens due process and equal protections of the law.

As it now stands, the case at bar sets a very damaging and strange precedent to the ambitions of foreign plaintiffs and impacts directly on the sovereignty of the State of Illinois. Illinois has now repealed its interspousal immunity law and permits recovery between spouses (effective 1/1/88). Consequently, in every case involving husband and wife, it will now be necessary to ascertain the law of the marital domicile so that plaintiff's suit may be dismissed if that law is antagonistic. It apparently would make no difference that the foreign travelers who come here have sought (and have often paid for) the protection of Illinois laws. They will not be able to recover because the law of their marital domicile controls.

From the beginning, all nations have recognized certain maxims respecting the laws of sovereigns. See *Lorenen Selected Articles on the Conflicts of Laws*, 163-66 (1947),

quoted in *Conflict of Laws, Cases, Comment, Questions* by Roger C. Cranston and David P. Currie, West Publishing Co. (1968), p. 2:

> "(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.
>
> (2) All persons within the limits of a government, whether they live there *permanently* or *temporarily*, are deemed to be subjects thereof."

As stated by Mr. Justice Story:

> ". . . every nation possess an exclusive sovereignty and jurisdiction within its own territory . . . the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons, who are resident within it, whether natural born subjects, or aliens; and also all contracts made, and acts done within it. A state may therefore regulate . . . the condition, capacity and state of all persons within it; the validity of contracts, and other acts, done within it; the resulting rights and duties growing out of those contracts and acts; and the remedies, and modes of administering justice in all cases calling for the interposition of its tribunals to protect, and vindicate, and secure the wholesome agency of its own laws within its own domains." (Quoted in Conflict of Laws, *supra*, p. 4).

Such is a correct statement of the law as it exists between sister states and nations today.

It is untrue that Canadian law, directly opposed to the Interspousal Immunity Act passed by our legislature, is not against our interests and policy. When the legislature speaks on a subject upon which it has the constitutional power to legislate, public policy is what the statute passed by it indicates. *Marvin N. Benn & Associates, Ltd. v. Nelson Steel and Wire, Inc.*, 63 Ill.Dec. 251, 254, 107 Ill.App.

3d 442, 437 N.E.2d 107; *Henderson v. Foster*, 59 Ill.2d 343, 347, 314 N.E.2d 789, 792 (1974). Only where an immunity has been judicially created can the courts constitutionally alter it. *Henderson*, 59 *id.* 347-8.

Yet the Illinois Supreme Court would alter the Interspousal Immunity Law of Illinois by recognizing an antagonistic and opposed foreign law on the dubious authority of Professors Beale and Reese of the American Law Institute. But even the American Law Institute would never suggest that foreign law be applied to defeat the immunity law of a purely domestic case. The Restatement Second presumes a neutral forum without interests to protect (a cause of action arising some place other than the forum state) that is seeking only to apply the most appropriate law. (See Perspectives on Conflict of Laws: Choice of Law by James H. Martin, Little Brown & Co., 1980 (p. 55).)

The Illinois Supreme Court has yet to cite one case in support of the idea that it can negate Illinois statutory law by applying the opposed law of a foreign nation to a purely domestic matter.

The Illinois Interspousal Immunity Act was part and parcel of Illinois liability for tort scheme and was applicable to all persons traveling Illinois roads and highways irrespective of their origins or citizenship.

III.

NEITHER ILLINOIS NOR ANY OTHER STATE IN THIS UNION, ON MATTERS PURELY DOMESTIC IN NATURE, HAS EVER RECOGNIZED A FOREIGN NATION'S LAW WHICH IS CONTRARY AND ANTAGONISTIC TO THAT STATE'S LAWS AND PUBLIC POLICY.

Generally, no statute has any force or effect beyond the limits of the sovereignty from which the authority is derived. (C.J.S., Conflict of Laws, Par. (3)(1)). Every state has the power to enact laws which bind its citizens while sojourning in foreign jurisdictions. *Wilson v. Cook*, 256 Ill. 460, 465, 100 N.E. 222 (1912). Such laws have no extra-territorial effect so as to authorize their enforcement in a foreign country. *Roth v. Roth*, 104 Ill. 35, 44, appeal dismissed *Roth v. Ehman*, 107 U.S. 319, 2 S.Ct. 312, 27 L.Ed. 499 (1882).

The only way that a foreign nation's law can be recognized by Illinois Courts is under the doctrine of comity, which clearly would prevent recognition of Canada's Family Reform Act.

Comity is not a matter of obligation on the one hand or mere courtesy and goodwill on the other hand. Comity is a nation's recognition of a foreign law, having due regard for international duty and convenience and to the rights of its own citizens. *Clubb v. Clubb*, 402 Ill. 390, 84 N.E.2d 366, 399-400 (1949).

The test of whether foreign laws should be enforced under the doctrine of comity in Illinois depends on "whether any wrong or injury will be done to a citizen of a state, whether the policies of (Illinois) laws will be contravened or impaired, or whether the Courts can do complete justice to those affected by the judgment." Illinois Law & Practice, Conflicts of Laws, Par. 4, pp. 120-121; *Edwards*

v. Schillinger, 245 Ill. 231, 241, 91 N.E. 1048 (1910). Illinois is not required to execute the law of a foreign state when that law is against public policy of Illinois. *Thomas v. First National Bank*, 213 Ill. 261, 266, 72 N.E. 801 (1904).

The public policy of Illinois is found in its Constitution, statutes, interpretive case law and sometimes the constant practice of goverment officials. *Smith v. Board of Ed. of Oswego Community H.S. Dist.*, 405 Ill. 143, 147, 89 N.E. 2d 893 (1950).

Illinois may recognize the law of the domicile, and quite often does in questions regarding marital or adoptive status. *McLaughlin v. People*, 403 Ill. 493, 496, 87 N.E. 2d 637 (1949); *Roth v. Roth*, 104 Ill. 35, 45 (1882). However, it is to be noted that Plaintiff-Respondent's case does not involve a question of marital status, but rather capacity to sue in tort.

At the time of the accident, it was the public policy of this state that a wife may not sue her husband in tort. *Williams v. Williams*, 108 Ill.App.3d 936, 941 (3rd Dist. 1982). Also, *Wartell v. Formusa*, 34 Ill.2d 57, 60, 213 N.E. 2d 544, 546 (1966) holding that the interspousal immunity statue is "a valid exercise of the legislature's power to enact legislation in furtherance of public policy and the general welfare of its citizens."

It is the public policy of Illinois that a wife may not sue her husband in tort because, as human nature has proven, there are few husbands who will maintain their freedom from fault in the face of a claim by their wife. Any such recovery in Illinois harms Illinois citizens by drastically increasing insurance prices they must pay, and is therefore unfair in face of a statute barring such recovery.

A complete and obvious answer at bar is that the Supreme Court of Illinois has no power to replace the doctrine of comity with the conflict of laws theories of the Restatement (Second) to avoid the public policy of Illinois.

IV.

CASE LAW DEMONSTRATES FOREIGN SPOUSES MAY NOT SUE EACH OTHER IN DEROGATION OF INTERSPOUSAL IMMUNITY LAW.

Peters v. Peters, 634 P.2d 586 (Hawaii 1981) is identical to the situation at bar. The *Peters*, like the Nelsons at bar, rented a car upon their arrival. The *Peters* felt they should be able to carry the interspousal laws of their home state, New York, with them to Hawaii. The Supreme Court of Hawaii declined to be welded to rules and formulas stating that "the preferred analysis, in our opinion, would be an assessment of the interests and public factors involved with the purpose of arriving at a desirable result in each situation."

First, the Court stated that the "forum, quo forum has an interest in preserving the integrity and economy of its judicial process, and neither Hawaii's interest in discouraging possibly collusive actions nor the State's reluctance to have its tribunals entertain claims its residents are precluded from filing can be discounted in this instance." 634 P.2d 594.

Second, the Court was mindful that "in a typical intrafamilial tort suit the insurer is the true defendant," the interests of the parties unite in favor of recovery and family harmony is assured instead of disrupted. 634 P.2d 594.

Third, the Court recognized that insurance policies covering "U-Drive" vehicles are undoubtedly written with the laws of Hawaii in mind because the geography of Hawaii

is such that no vehicle can be driven beyond the borders of the state. (In Illinois, however, insurance on Avis vehicles is written with the laws of Illinois in mind because said insurance is mandated by the laws of Illinois. 3 Ill.Rev.Stat., 1985, Chap. 95½, Par. 9-101, *et seq.*) Clearly, at bar, the Nelsons could not avail themselves of Illinois mandated insurance without also agreeing the laws of Illinois including interspousal immunity be embodied therein.

Fourth, and most importantly, the Court said:

> Where a state attracts the number of visitors that Hawaii does, it can be expected that many of them will lease "U-Drive" cars, some of them will be involved in an accident, and more than a few married persons will be injured as a result of their spouse's negligent operation of the vehicles. Our visitors are domiciled throughout the United States and in many foreign countries, and a reliance on the law of the domicile to determine the viability of interspousal actions would neither provide predictability of result nor simplify the judicial task. More importantly, any resulting significant increase in the number of tort actions entertained by our Courts will adversely affect insurance premiums indirectly payable by residents of Hawaii who lease "U-Drive" cars, though Hawaii couples remain bound by interspousal immunity and will not benefit from the judicial expansion of compulsory insurance coverage which would be responsible for the premium increase.

Conversely, the law of the domicile is sometimes favored because the Plaintiff's insurance is ordinarily written there (which, of course, is not the case at bar). See *Johnson v. Johnson*, 107 N.H. 30, 32-33, 216 A.2d 781, 783 (1966).

The *Peters* Court, recognizing that its decision was not in harmony with Restatement Second, concluded that "considerations of public policy and the demonstrated interests of the State of Hawaii impel the approval of the Circuit Court's choice of *lex loci fori* over *lex loci domicilii.*"

Illinois has a vital interest in promoting its commerce and assuring that insurance and car rental rates are moderated. The convenience of renting a car should be within reach of more people than the very affluent. Where Illinois has mandated the insurance under which Plaintiff seeks to recover, Illinois has a perfect right, in its own self-interest, to insist that its laws shall apply and *not the laws of a thousand and one foreign jurisdictions.*

CONCLUSION

In an effort to favor a Canadian litigant by allowing the right to sue under Canadian law, the Illinois Appellate and Supreme Court have made bad law which unconstitutionally impact adversely on Illinois interspousal immunity and right to sue statutes and deprives the Defendant herein of due process and equal protection.

The issues presented are of serious and grave concern to all foreign married persons who seek the protections of Illinois law as they travel the roads of Illinois. Petitioner respectfully requests that this petition for certiorari be granted.

Dated: August 29, 1988

Respectfully submitted,

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APPENDIX

Docket No. 64314—Agenda 28—May 1987.

STEVEN NELSON, Special Adm'r of the Estate of Marjorie Nelson, Appellee, v. LINDA F. HIX (Arthur R. Nelson, Appellant).

JUSTICE MILLER delivered the opinion of the court:

On August 11, 1980, Marjorie Nelson was a passenger in an automobile being driven by her husband, Arthur. The automobile had been rented by the Nelsons from a car-rental company at O'Hare International Airport. The Nelsons, who were residents and citizens of Ontario, Canada, were visiting relatives in Illinois. The automobile was involved in a collision in Glendale Heights, Illinois, with a vehicle being driven by Linda Hix. Both Marjorie and Arthur sustained serious injuries as a result of the accident.

Marjorie and Arthur Nelson subsequently filed suit against Linda Hix in the circuit court of Du Page County. After filing suit, Arthur settled his claim against Hix for $15,000 and Arthur's suit against Hix was dismissed.

On July 30, 1982, after Arthur dismissed his suit against Hix, Marjorie Nelson filed an amended complaint in which she named her husband, Arthur, an additional defendant and amended her complaint against Hix. Count I of the amended complaint alleged various acts of negligence by Linda Hix. Count II alleged various acts of negligence by Arthur.

After filing the amended complaint, Marjorie died of causes unrelated to the accident. Steven Nelson, her son, was named special administrator of Marjorie's estate and was substituted as plaintiff in the lawsuit.

Arthur then filed a motion to dismiss count II of the amended complaint on the ground that the suit against him was barred by the interspousal tort immunity statute in effect in Illinois at the time of the accident. (Ill. Rev. Stat. 1983, ch. 40, par. 1001.) The trial judge found that Illinois law, which barred the suit, rather than Canadian

law, which would have permitted the suit, applied and dismissed Arthur as a defendant.

Following various motions not relevant to this appeal, directed to plaintiff's second and third amended complaints, the plaintiff, Steven Nelson, filed a fourth amended complaint on behalf of Marjorie's estate. The first two counts were brought under the Survival Act (Ill. Rev. Stat. 1983, ch. 110½, par. 27-6) against Hix and Arthur Nelson, respectively. The third and fourth counts were brought under the Wrongful Death Act (Ill. Rev. Stat. 1983, ch. 70, pars. 1 through 2.2) again against Hix and Nelson, respectively.

On Arthur's motion, the trial judge dismissed count II against Arthur, and allowed the plaintiff to voluntarily dismiss count IV, the remaining count against Arthur. The trial judge also allowed the plaintiff's motion to voluntarily dismiss counts I and III of the amended complaint against Linda Hix, and Hix was dismissed from the lawsuit without prejudice to further action.

The plaintiff appealed the trial court's dismissal of count II against Arthur. On appeal, the appellate court found that Marjorie had been married to Arthur at the time of the accident, and that the Nelsons resided in Ontario, Canada. The appellate court noted that at the time of the accident an Illinois statute prohibited spouses from suing one another for a tort to the person committed during coverture (Ill. Rev. Stat. 1979, ch. 40, par. 1001), but that the law of Ontario, Canada, permitted such suits (Family Law Reform Act, Ont. Rev. Stat., ch. 152, §65(3)(a) (1980)). Relying upon *Wartell v. Formusa* (1966), 34 Ill. 2d 57, the appellate court held that the law of the marital domicile applied in resolving the question of whether one spouse can maintain an action in tort against the other and, based on the law of Ontario that allowed such suits, reversed the judgment of the trial court. (146 Ill. App. 3d 486.) We allowed Arthur's petition for leave to appeal. 107 Ill. 2d R. 315(a).

The defendant, Arthur Nelson, argues that Illinois' conflict of law rules require the application of Illinois law, rather than the law of the marital domicile, in resolving the question of whether or not the spouse can maintain an action in tort against the other in Illinois. The defendant also argues that under the doctrine of comity, the law of Canada that allowed interspousal suits is not binding upon Illinois courts. He further contends that the Canadian law that allowed interspousal suits violated the public policy of Illinois at the time of the accident, and that Illinois courts should, therefore, refuse to follow it. The defendant finally asserts that the Illinois law that barred interspousal tort suits was procedural, and that under accepted conflict of laws analysis, Illinois law should be applied as a matter of forum law.

The plaintiff contends that under Illinois' conflict of law rules, the law of the marital domicile must be applied to determine whether one spouse may maintain an action in tort against the other. He also argues that the principles and policy behind the doctrine of comity are best served by recognition of the plaintiff's cause of action. He further argues that whether one spouse may sue the other in tort is a matter of substantive law and that on this question the law of the marital domicile should apply.

We note initially that under the Restatement (Second) of Conflict of Laws, a court is usually to apply its own local law to issues relating to the conduct of litigation and judicial administration. (Restatement (Second) of Conflict of Laws §122 (1971) (Restatement (Second)).) The Restatement (Second), however, has abandoned the substantive-procedural approach in determining whether to apply the law of the forum or some other jurisdiction to resolve other issues in the case. Rather than classifying an issue as substantive or procedural, the Restatement (Second) instead focuses on other factors set forth in the Restatement (Second) to determine whether to apply the law of the forum or some other jurisdiction to resolve the issue. Restatement (Second) of Conflict of Laws §122, comment b (1971).

We are presented here with laws which were in conflict on the date of the accident on the question of interspousal tort immunity. On the date of the accident, section 1 of "An Act to revise the law in relation to husband and wive" provided:

> "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture." Ill. Rev. Stat. 1979, ch. 40, par. 1001 (the Immunity Act).

The Family Law Reform Act 1975, of Ontario, Canada, the place of the Nelsons' residence, which was in effect at the time of the accident provided:

> "[E]ach of the parties to a marriage has the like right of action in tort against the other as if they were not married." Ont. Rev. Stat., ch. 152, §65(3)(a) (1980).

In *Wartell v. Formusa* (1966), 34 Ill. 2d 57, presenting substantially the same issue presented in this cause, the court adopted the view of the Restatement (Second) of Conflict of Laws (Tent. Draft No. 9 (1964)) (the precursor to the present Restatement (Second) of Conflict of Laws (1971)), concerning which State's law to apply when confronted with laws of different States governing interspousal tort immunity.

In *Wartell*, a married couple, both residents of Illinois, were involved in an automobile accident in Florida. Mr. Wartell died and Mrs. Wartell later brought suit in the circuit court of Cook County against the executor of her husband's estate. Both Illinois and Florida law barred an action by one spouse against the other for a tort committed during coverture. Because the plaintiff was challenging the constitutionality of interspousal immunity, the court was asked to determine which State's law applied to the action. In *Wartell*, the court stated:

> "[T]he distinct question of whether one spouse can maintain an action in tort against the other spouse is clearly a matter which should be governed by the law of the domicile of the persons involved." *Wartell*, 34 Ill. 2d at 59.

The defendant argues that the decision in *Wartell* should not serve as precedent in the present cause because the court in *Wartell* decided only that between similar laws of two different States, both barring interspousal tort suits; the Illinois law on the question should apply in Illinois courts to a suit between spouses who were residents of Illinois at the time of the accident. The defendant correctly notes that the court in *Wartell* was not asked to decide whether Illinois courts should enforce a conflicting State law that allowed interspousal tort suits in a tort action brought in Illinois between spouses who were residents of the other State.

We believe, however, that the analysis of *Wartell* and the policy behind section 169, which *Wartell* adopted, support the application of the view that the law of the couple's domicile should govern the question of whether one spouse can sue the other in tort.

In *Wartell*, the court stated that Illinois had a predominant interest in the preservation of the marriage relationship of its citizens and applied Illinois law. (*Wartell*, 34 Ill. 2d at 59.) In analyzing the issue, the court adopted the approach suggested by the Restatement (Second) of Conflict of Laws (Tent. Draft No. 9, par. 390g (1964), the precursor to the present section 169 of the Restatement (Second) of Conflict of Laws (1971)).

Section 169 states:

> "(1) The law selected by application of the rule of §145 determines whether one member of a family is immune from tort liability to another member of the family.
>
> (2) The applicable law will usually be the local law of the state of the parties' domicile." (Restatement (Second) of Conflict of Laws §169 (1971).)

Section 169 recognizes that the marital domicile retains a paramount interest in the incidents of the family relationship and that the law of the domicile should govern whether interfamily tort immunity exists. Restatement (Second) §169, comment b at 507.

Although section 169 states that the applicable law governing interspousal immunity issues will usually be the law of the parties' domicile, it further states that the law "selected by application of the rule of §145 determines" the issue. Restatement (Second) of Conflict of Laws §169 (1971).) This court has previously adopted the choice-of-law analysis suggested in section 379 of the Restatement (Second) of Conflict of Laws (Tent. Draft No. 9 (1964)). (See *Ingersoll v. Klein* (1970), 46 Ill. 2d 42.) This section has subsequently been adopted by the American Law Institute, with minor substantive changes, as section 145 of the Restatement (Second) of Conflict of Laws (1971). Under section 145 of the Restatement (Second), the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the State which has the most significant relationship to the occurrence and the parties.

Section 145 states:

> "(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.
>
> (2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.

> These contacts are to be evaluated according to their relative importance with respect to the particular issue." Restatement (Second) of Conflict of Laws §145 (1971).

In the case before us, both the injury and the accident occurred in Illinois. Both the plaintiff and the defendant husband, however, were residents of Ontario, Canada, and the marital relationship was centered in Ontario. Section 145 notes that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." (Restatement (Second) of Conflict of Laws §145 (1971).) Because the question here is whether to apply a Canadian law that allows interspousal tort suits rather than the Illinois law that, at the time of the accident, prohibited such suits, the domicile of the parties and the place where their marital relationship was centered is, in our opinion, more important to a resolution of the issue than where the accident and injury occurred.

Section 145 directs courts to consider the applicable contacts in light of the relevant general principles embodied in section 6 governing all choice-of-law decisions (Restatement (Second) of Conflict of Laws §145(1) (1971)). Section 6 sets forth seven general principles for courts to consider in determining which State has the most significant relationship to the parties and the occurrence. Of relevance to this action, section 6 requires consideration of the relevant policies of the forum; the relevant policies of other interested States and the relative interests of those States in the determination of the issue in question; and the basic policies underlying the particular field of law, in making the choice of law. Restatement (Second) of Conflict of Laws, §§6(b), (c), (e) (1971).

We note that section 169 of the Restatement (Second) recognizes that the "[s]tate of domicile is the one most concerned with the well-being of the spouses and protection of the marital relationships, and it is upon this that it bases its claim to primary interest in the outcome of the conflicts situation." (Felex, *Interspousal Immunity in the Conflict of Laws: Automobile Accident Claims*, 53

Cornell L. Rev. 406, 418 (1968).) The State of domicile, moreover, "has the primary responsibility for establishing and regulating the incidents of the family relationship." *Emery v. Emery* (1955), 45 Cal. 2d 421, 428, 289 P.2d 218, 223.

Illinois, on the other hand, has little interest in regulating the right of married foreign citizens to maintain actions in tort against each other. Because the Nelsons are not citizens of Illinois, this State has no governmental interest in the preservation of their marital relationship. Although Illinois possesses an interest in not having its courts used for collusive lawsuits, we believe that this interest is not furthered by barring interspousal tort suits by citizens of other States or countries.

Further, Ontario's interest in regulating the incidents of the family relationships of its domiciliaries outweighs any interest Illinois may have in protecting the expectations of insurance carriers who have issued policies here. The Nelsons rented a car licensed and registered in Illinois, and purchased insurance covering the automobile for the rental period from an Illinois insurer. The insurance policy did not provide that claims under the policy were to be governed by the laws of Illinois. Automobiles are by their nature mobile, and insurers are on notice that they may be driven to States which prohibit interspousal tort suits by persons from jurisdictions that have abrogated that immunity. See *Nationwide Mutual Insurance Co. v. Perlman* (1983), 187 N.J. Super. 499, 455 A.2d 527.

The defendant argues under the doctrine of comity, courts are not required to give effect to laws which violate their States' public policy and that Illinois should not recognize or apply the law of Ontario at issue here. Comity is an older doctrine which "was generally accepted as an operational theory in the courts during the half century from 1850-1900." (E. Scoles & P. Hay, Conflict of Laws 13 (1984).) We note, too, that effective January 1, 1988, Illinois has amended its law to permit interspousal tort suits. (Pub. Act 85-625, eff. Jan. 1, 1988 (amending Ill. Rev. Stat. 1985, ch. 40, par. 1001).) In any event, comity never re-

quired courts to recognize or refuse to recognize a foreign law. Comity only provided a means for courts to refuse to apply foreign law which was clearly contrary to the "public morals, natural justice or the general interest of the citizens of this State." (*Wintersteen v. National Cooperage & Woodenware Co.* (1935), 361 Ill. 95, 101.) We cannot say that at the time of the accident, the law of Ontario was clearly contrary to the public morals, natural justice or the general interest of the citizens of this State.

Finally, we note that many other forums have followed the Restatement's approach in applying the law of the marital domicile in conflict cases involving the question of interspousal immunity. See *Edmunds v. Edmunds* (D.C. Cir. 1972), 353 F. Supp. 287; *Tucker v. Norfolk & Western Ry. Co.* (E.D. Mich. 1975), 403 F. Supp. 1372; *Potter v. St. Louis-San Francisco Ry. Co.* (8th Cir. 1980), 622 F.2d 979; *Zurzola v. General Motors Corp.* (3d Cir. 1974), 503 F.2d 403; *LeBlanc v. Stuart* (D. Vt. 1972), 342 F. Supp. 773; *Armstrong v. Armstrong* (Alaska 1968), 441 P.2d 699; *Schwartz v. Schwartz* (1968), 103 Ariz. 562, 447 P.2d 254; *Emery v. Emery* (1955), 45 Cal. 2d 421, 289 P.2d 218; *Johnson v. Johnson* (1966), 107 N.H. 30, 216 A.2d 781; *Koplik v. C. P. Trucking Corp.* (1958), 27 N.J. 1, 141 A.2d 34; *Robertson v. Estate of McKnight* (Tex. 1980), 609 S.W.2d 534; *Haumschild v. Continental Casualty Co.* (1959), 7 Wis. 2d 130, 95 N.W.2d 814.

For the reasons stated, we hold that the domicile of the parties involved in the present case controls the law that is to be applied in resolving the question of interspousal immunity. Because both plaintiff and defendant were residents of Ontario, Canada, we find that Ontario law applies and that the suit is not barred in Illinois.

Judgment affirmed.

(Letterhead Of)

ILLINOIS SUPREME COURT
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May 31, 1988

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No. 64314—Stephen Nelson, Special Admr., etc., appellee,
v. Linda F. Hix (Arthur R. Nelson, appellant).
Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 10, 1988.

A. 11

[FILED JULY 7, 1986]

No. 85-447

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

STEPHEN NELSON, Special Administrator of the Estate of MARJORIE NELSON, deceased,

Plaintiff-Appellant,

v.

LINDA F. HIX,

Defendant,

and

ARTHUR R. NELSON,

Defendant-Appellant.

Appeal from the Circuit Court for the
18th Judicial Circuit, DuPage County, Illinois.
Hon. Richard Lucas, Judge Presiding.

JUSTICE SCHNAKE delivered the opinion of the court:

The sole issue to be decided on appeal is whether the law of a married couple's domicile or the law of the place of the injury controls their capacity to sue one another in tort. The trial court applied the law of the place of the injury and dismissed the complaint. We reverse.

Arthur and Marjorie Nelson, husband and wife residents of Mississauga, Ontario, Canada, were visiting relatives in Illinois when they were involved in an automobile collision in DuPage County. At approximately 1:30 p.m. on

August 11, 1980, while driving eastbound on Route 64 in a rented automobile, the Nelsons' car struck a second car driven by Linda Hix. As a result of the collision Marjorie Nelson, who was a passenger in the automobile, was injured.

On September 9, 1980, the Nelsons filed this action against Hix. Thereafter Arthur Nelson entered into a settlement agreement with Hix, and the court dismissed his claim against her on July 30, 1982. On that same day Marjorie Nelson amended her complaint adding Arthur Nelson as a defendant. On October 27, 1983, Stephen Nelson was substituted as plaintiff for Marjorie Nelson who died of cancer on March 9, 1983. On January 6, 1985, plaintiff filed a fourth amended complaint which is currently before the court. This complaint sought damages against Arthur Nelson based on the Wrongful Death Act (count I) and the Survival Act (count II). The trial court dismissed count II on May 13, 1985, and on plaintiff's own motion, also dismissed count I. Plaintiff then filed this appeal arguing that the trial court erred in dismissing count II.

The Illinois statute involved in this case states in part:

> "[N]either husband nor wife may sue the other for a tort to the person committed during coverture." (Ill. Rev. Stat. 1979, ch. 40, par. 1001.)

The Ontario statute involved in this case states in part:

> "[E]ach of the parties to a marriage has the right of action in tort against the other as if they were not married." (Family Law Reform Act, Can. Rev. Stat. (1980), ch. 152, section 65(3)(a).)

Because the two statutes are in direct conflict with each other, we are faced with the customary conflict of laws issue where it is necessary to choose between two conflicting laws.

In *Wartell v. Formusa* (1969), 34 Ill. 2d 57, a married couple domiciled in Illinois were involved in an automobile collision while on vacation in Florida. The wife brought an action against her husband's estate in Illinois for the

tort committed in Florida. Our supreme court held that the law of the parties domicile would control the question of whether the wife could sue her husband stating:

> "In our opinion, the law of Illinois clearly applies in this case. We can think of no reason why Florida law should control the question whether a husband and wife domiciled in Illinois should be able to maintain an action against each other for a tort committed during coverture. The fact that the alleged tortious act took place in Florida is of no significance in determining which law should govern the determination of this issue. The law of the place of the wrong should of course determine whether or not a tort has in fact been committed, but the distinct question of whether one spouse can maintain an action in tort against the other spouse is clearly a matter which should be governed by the law of the domicile of the persons involved. Here the domicile is Illinois. Illinois has the predominant interest in the preservation of the husband-wife relationship of its citizens, and to apply the law of Florida to the question of whether interspousal tort suits may be permitted between Illinois residents would be illogical and without a sound basis. This position has been adopted by the Restatement Second of Conflict of Laws, Tentative Draft No. 9, par. 390 g, which provides in part that 'whether one member of a family is immune from tort liability to another member of the family is determined by the local law of the state of their domicile.' An increasing number of courts have also held this to be the better reasoned view. [Citations.] We also adopt this view and hold that in this case the Illinois immunity statute is determinative of the question of whether plaintiff may maintain this action against her deceased husband's estate." 34 Ill. 2d 57, 59-60; cf. *Aurora National Bank v. Anderson* (1971), 132 Ill. App. 2d 217 (law of domicile of parties controls right of child to sue parent).

We find *Wartell* controlling in the present action.

Defendant's argument that *Wartell* is largely dictum is unconvincing. While it is true that in *Wartell* both Florida and Illinois law prohibited interspousal suits, the court specifically stated that it was necessary to determine which state law applied in order to decide the plaintiff's contention that either law was unconstitutional. Further, defendant's reliance on policy considerations is misplaced before this court in light of the fact that our supreme court has already decided this precise issue.

For the reasons stated herein, the judgment of the circuit court of DuPage County is reversed and remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

HOFF and LINDBERG, JJ., concur.

UNITED STATES OF AMERICA

State of Illinois,
Appellate Court,—ss.
Second District,

I, LOREN J. STROTZ, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the decision of the said Appellate Court in the above entitled cause of record in my said office.*

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 7th *day of* July, *A.D. 1986.*

/s/ Loren J. Strotz
Clerk Appellate Court,
Second District

UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT

Nelson et al

Vs. No. 80L1178

Hix et al

ORDER

This matter coming on to be heard on Motion of Appellant Arthur Nelson to dismiss Count II and Count IV of Plaintiff's Fourth Amended Complaint, due notice being given and the Court being fully advised in the premises, it is hereby ordered:

1. That Count II of Plaintiff's Fourth Amended Complaint is dismissed as to Appellant Arthur Nelson, there being no just reason to delay enforcement of appeal.

2. That Plaintiff, pursuant to oral Motion, voluntarily dismissed Count IV of the Fourth Amended Complaint against Arthur Nelson pursuant to Sec. 2109 of the Illinois Code of Civil Procedure.

Enter: 5/13/85

State of Illinois
Appellate Court Second District
Elgin
60120

Office of the Clerk
312-695-3750

Appeal from the Circuit Court of County of DuPage

Trial Court Number: 80L1178

THE COURT HAS THIS DAY, 09/23/86, ENTERED THE FOLLOWING ORDER IN THE CASE OF:
Gen. No.: 2-85-0447

Nelson, Stephen et al v Hix, Linda F. & Nelson, A. R.

Petition by Appellee for rehearing denied.

LOREN J. STROTZ, Clerk

cc: Patrick J. Kenneally
Peter R. Coladarci
Iversen, Carlson & Associates
Herbert P. Carlson

A. 17

[Filed July 6, 1988]

No. 64314

IN THE
SUPREME COURT OF ILLINOIS

In re:

STEPHEN NELSON, Special Administrator of the estate of Marjorie Nelson, deceased.

Plaintiff/Appellee,

v.

LINDA F. HIX,

Defendant,

ARTHUR R. NELSON,

Defendant/Appellant.

ORDER

This matter has come for consideration upon the motion of Defendant/appellant to recall the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is recalled pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If

no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Thomas J. Moran
Justice,
Supreme Court of Illinois

Constitution of the United States

ARTICLE III

* * *

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT XIV

* * *

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Illinois

Adopted at Special Election on December 15, 1970
Generally Effective July 1, 1971

ARTICLE I
BILL OF RIGHTS

* * *

§ 2. Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

ARTICLE II
THE POWERS OF THE STATE

§ 1. Separation of Powers

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Ill.Rev.Stat., (1985), Chap. 40, Par. 1001

1001. Married women may sue and be sued—Attachment or judgment

§ 1. A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture, other than an intentional tort. No finding by any court or testimony in any proceeding under Section 401 of the Illinois Marriage and Dissolution of Marriage Act[1] shall be admissible, used for impeachment purposes or be used as prima facie evidence of an intentional tort in any civil action brought pursuant to the provisions of this Act. Nothing in the Section shall limit or prevent any witness who testifies in a proceeding under Section 401 of the Illinois Marriage and Dissolution of Marriage Act from testifying in any other civil action. An attachment or judgment in such action may be enforced by or against her as if she were a single woman.

Amended by P.A. 82-783, Art. III, § 24, eff. July 13, 1982.

[1] Paragraph 401 of this chapter.

Article III of P.A. 82-783, the 1982 Revisory Act, resolved multiple actions of the 82nd General Assembly.

A. 22

Family Law Reform

CHAPTER 41

An Act to reform certain Laws founded upon Marital or Family Relationships

Assented to July 3rd, 1975

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts at follows:

I.—(1) For all purposes of the law of Ontario, a married man has a legal personality that is independent, separate and distinct from that of his wife and a married woman has a legal personality that is independent, separate and distinct from that of her husband.

(2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if such person were an unmarried person.

(3) Without limiting the generality of subsections 1 and 2,

(*a*) each of the parties to a marriage has the like right of action in tort against the other as if they were not married;

* * * * *